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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

CHRISTOPHER LEE WHEELER,

Plaintiff,

v.

SPARKS POLICE DEPARTMENT, et al.,

Defendants.

3:17-cv-00321-MMD-VPC

**REPORT AND RECOMMENDATION**  
**OF U.S. MAGISTRATE JUDGE**

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This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is Christopher Lee Wheeler's ("plaintiff") application to proceed in forma pauperis (ECF No. 5) and pro se complaint (ECF No. 1). Consistent with the following, the court recommends that the complaint proceed as to certain defendants and claims, and be dismissed as to others.

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**I. IN FORMA PAUPERIS APPLICATION**

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Plaintiff did not attach an application to proceed in forma pauperis to his complaint. (See ECF no. 1.) Plaintiff then filed a motion for leave to proceed in forma pauperis, which appeared to consist entirely of an incomplete in forma pauperis application. (See ECF No. 3.) The court denied the motion without prejudice, and ordered plaintiff to submit a completed in forma pauperis application and attach an inmate account statement and properly executed financial certificate. (ECF No. 4.) Plaintiff submitted a completed in forma pauperis application with the required attachments. (ECF No. 5.)

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As set forth in 28 U.S.C. § 1915(a), the court may authorize a plaintiff to proceed in forma pauperis if he or she is unable to pay the prescribed court fees. The plaintiff need not "be absolutely destitute to enjoy the benefits of the statute." *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 339 (1948). Rather, "[a]n affidavit in support of an IFP application is

1 sufficient where it alleges that the affiant cannot pay the court costs and still afford the necessities  
2 of life.” *Escobedo v. Applebees*, 787 F.3d 1226, 1234 (9th Cir. 2015). Based on plaintiff’s  
3 application, the court finds that plaintiff is unable to pay the filing fee in this matter. (See ECF  
4 No. 5.) Accordingly, the court recommends that plaintiff’s application to proceed in forma  
5 pauperis be granted.

## 6 **II. LEGAL STANDARD**

7 Inmate civil rights complaints are governed by 28 U.S.C. § 1915A. Section 1915A  
8 provides, in relevant part, that “the court shall dismiss the case at any time if the court determines  
9 that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim upon which  
10 relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such  
11 relief.” 28 U.S.C. § 1915A(b). A complaint is frivolous when “it lacks an arguable basis in either  
12 law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). This includes claims based on  
13 legal conclusions that are untenable (e.g., claims against defendants who are immune from suit or  
14 claims of infringement of a legal interest which clearly does not exist), as well as claims based on  
15 fanciful factual allegations (e.g., delusional scenarios). *Id.* at 327–28; see also *McKeever v.*  
16 *Block*, 932 F.2d 795, 798 (9th Cir. 1991). Dismissal for failure to state a claim under § 1915A  
17 incorporates the same standard applied in the context of a motion to dismiss under Federal Rule  
18 of Civil Procedure 12(b)(6), *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012), which  
19 requires dismissal where the complaint fails to “state a claim for relief that is plausible on its  
20 face,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

21 The complaint is construed in a light most favorable to the plaintiff. *Chubb Custom Ins.*  
22 *Co. v. Space Systems/Loral Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The court must accept as true  
23 all well-pled factual allegations, set aside legal conclusions, and verify that the factual allegations  
24 state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). The complaint  
25 need not contain detailed factual allegations, but must offer more than “a formulaic recitation of  
26 the elements of a cause of action” and “raise a right to relief above a speculative level.”  
27 *Twombly*, 550 U.S. at 555. Particular care is taken in reviewing the pleadings of a pro se party,  
28 for a more forgiving standard applies to litigants not represented by counsel. *Hebbe v. Pliler*, 627

1 F.3d 338, 342 (9th Cir. 2010). Still, a liberal construction may not be used to supply an essential  
2 element of the claim not initially pled. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992). If  
3 dismissal is appropriate, a pro se plaintiff should be given leave to amend the complaint and  
4 notice of its deficiencies, unless it is clear that those deficiencies cannot be cured. *Cato v. United*  
5 *States*, 70 F.3d 1103, 1107 (9th Cir. 1995).

### 6 **III. DISCUSSION**

7 Plaintiff is an inmate in the custody of the Stewart Conservation Camp. (ECF No. 5.)  
8 Proceeding pro se and pursuant to 42 U.S.C. § 1983, plaintiff brings civil rights claims against the  
9 Sparks Police Department (“SPD”), three SPD officers, the City of Sparks, Washoe County, and  
10 the State of Nevada for actions taken in the course of his arrest for violating his probation. (ECF  
11 No. 1-1 at 3–5.)

12 As set forth in Count I, Officer Fye (“Fye”) and Officer Butler (“Butler”) entered  
13 plaintiff’s home in response to an “alleged domestic disturbance ....” (Id. at 4.) Plaintiff was  
14 compliant, answered Fye and Butler’s questions regarding the domestic disturbance, and finally  
15 attempted to use his restroom “before going outside to be contained.” (Id.) Fye and Butler  
16 pursued plaintiff, and in the process plaintiff’s fiancée had to “grab [plaintiff’s] son Zion from the  
17 officers falling and crushing him ....” (Id.) Fye and Butler proceeded to kick the restroom door  
18 off the hinges and tase plaintiff repeatedly. (Id.) Plaintiff was then “handcuffed from behind, and  
19 while completely drained [he] was tazed [sic] again and again.” (Id.)

20 Lieutenant Krall (“Krall”) then arrived at plaintiff’s residence. Plaintiff states that Krall  
21 was “vulgar, belligerent, out of control and high strung in front of [his] family.” At some point,  
22 Krall smashed plaintiff’s head repeatedly into a pillar, which resulted in a gash on plaintiff’s  
23 head. While plaintiff was being escorted away by Fye and Butler, Krall tased plaintiff “again and  
24 again” despite plaintiff “not posing as a threat ....” (Id.)

25 In Count II, plaintiff alleges that he told Fye, Butler, and Krall that he needed immediate  
26 medical attention for the injuries he sustained during the arrest. (ECF No. 1-1 at 5.) The officers  
27 “denied any and all medical attention I should have received by law” and instead told plaintiff,  
28 “Shut the fuck up nigger!” (Id.) Plaintiff speculates that he suffered “multiple contusions,

1 lacerations, and abrasions ... during the assault.” (Id.) He also believes he suffered a concussion  
2 because he was “in and out of consciousness at that time.” (Id.) Plaintiff contends that Fye,  
3 Butler, and Krall purposefully refused to have plaintiff seen by a doctor because “they wanted no  
4 evidence in writing that could be used against them” in court. (Id.)

5 In Count III, plaintiff claims that both he and his son suffer from “serious mental health  
6 issues” as a result of the brutal and unnecessary nature of his arrest. (Id. at 6.) Specifically,  
7 plaintiff’s five-year old son is “terrified of what the police are capable of doing after witnessing  
8 first hand [sic] the atrocities [sic] done onto [sic] his father,” such as seeing Krall “brutally”  
9 bludgeoning plaintiff’s head against a pillar. (Id.) As for plaintiff, he claims to have “constant  
10 nightmares” and suffer from “mental anguish and pains” that are unbearable. (Id.) Plaintiff does  
11 not provide any further detail regarding his, or his son’s, mental health.

12 Plaintiff contends that the events described above violated his Sixth, Eighth, and  
13 Fourteenth Amendment rights. (Id. at 4-6.) He requests seven million dollars in damages, and  
14 seeks to have SPD “leave and stop harassing [his] family ....” (Id. at 9.)

15 Despite being named as defendants, the City of Sparks, Washoe County, and the State of  
16 Nevada are not mentioned in the body of the complaint. (See id. at 4–6.) SPD is mentioned only  
17 briefly in the request for relief. (Id. at 9.)

18 The court now turns to plaintiff’s claims: (1) plaintiff’s claims against the State of  
19 Nevada; (2) his claims against the City of Sparks, Washoe County; and, (3) his claims against  
20 Fye, Butler, and Krall.

21 **A. The State of Nevada**

22 At the outset, the court must dismiss any claim plaintiff may have against the State of  
23 Nevada. “The Eleventh Amendment bars suits against the State or its agencies for all types of  
24 relief, absent unequivocal consent by the state.” *Romano v. Bible*, 169 F.3d 1182, 1185 (9th Cir.  
25 1999) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984)). Section  
26 1983 does not abrogate the states’ sovereign immunity, *Stivers v. Pierce*, 71 F.3d 732, 749 (9th  
27 Cir. 1995), and Nevada has not consented to suit, Nev. Rev. Stat. § 41.031(3). Accordingly,  
28 plaintiff’s claims against the State of Nevada are barred and should be dismissed with prejudice.

1 **B. The City of Sparks, Washoe County, and SPD**

2 The court also recommends dismissal of plaintiff’s claims as to the City of Sparks,  
3 Washoe County, and SPD. Although the court is to construe his complaint liberally, even pro se  
4 plaintiffs must identify some cognizable basis for each legal claim. Twombly, 550 U.S. at 570.  
5 The complaint must not force the court to spend its resources “preparing the ‘short and plain  
6 statement’ which Rule 8 obligated plaintiffs to submit ....” McHenry v. Renne, 84 F.3d 1172,  
7 1179 (9th Cir. 1996). Without providing “a short and plain statement of the claim showing that  
8 the pleader is entitled to relief” defendants would be deprived of “fair notice of what the ... claim  
9 is and the grounds upon which it rests.” Twombly, 550 U.S. at 555 (quotation and alteration  
10 omitted). Furthermore, a liberal construction may not be used to supply an essential element of  
11 the claim not initially pled. Pena v. Gardner, 976 F.2d 469, 471 (9th Cir. 1992).

12 Plaintiff has wholly failed to allege any facts, much less a short and plain statement,  
13 showing his entitlement to relief that could support a cognizable claim against the City of Sparks  
14 and Washoe County. See McHenry, 84 F.3d at 1179. Furthermore, though plaintiff seeks  
15 injunctive relief against SPD, he fails to identify a theory of liability upon which the court can  
16 grant him the requested relief. The court may not project essential elements upon plaintiff’s  
17 complaint to hold SPD liable for the actions of its officers. See, e.g., *Monell v. Dep’t of Soc.*  
18 *Servs.*, 436 U.S. 658, 690 (1978) (setting forth a standard for claims against municipalities and  
19 other governmental units). Thus, the court recommends that plaintiff’s claims against the City of  
20 Sparks, Washoe County, and SPD be dismissed without prejudice, with leave to amend to provide  
21 plaintiff the opportunity to allege relevant facts and identify a theory of liability against these  
22 defendants, where possible.

23 **C. Fye, Butler, and Krall**

24 **a. Sixth Amendment**

25 Plaintiff claims that Fye, Butler, and Krall’s actions during and immediately after his  
26 arrest violated the Sixth Amendment. (ECF No. 1-1 at 4–6.) The Sixth Amendment guarantees  
27 criminal defendants certain rights related to criminal prosecutions, including the right to a speedy  
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1 and public trial, to be informed of the nature of the accusation against them, and to have the  
2 assistance of counsel. U.S. CONST. amend. VI.

3 Plaintiff has failed to state a Sixth Amendment claim. Although plaintiff claims that his  
4 Sixth Amendment rights were violated in Counts I, II, and III, his assertions and factual  
5 allegations appear wholly unrelated to his prosecution or conviction. Instead, the allegations in  
6 Counts I and III take issue with the potentially unlawful force applied against him during his  
7 arrest, while Count II concerns the officers' failure to provide plaintiff medical care immediately  
8 following his arrest. (ECF No. 1-1 at 4.) The court is unable to discern a possible theory for  
9 liability under the Sixth Amendment against any of the named defendants. Therefore, the court  
10 recommends that plaintiff's Sixth Amendment claim be dismissed with prejudice because  
11 amendment would be futile. See *Cato*, 70 F.3d at 1106.

12 **b. Eighth Amendment Claim**

13 Plaintiff appears to assert two Eighth Amendment claims against Fye, Butler, and Krall:  
14 one of excessive force during plaintiff's arrest, and the other of deliberate indifference to  
15 plaintiff's medical needs immediately following plaintiff's arrest. (ECF No. 1-1 at 4.) The  
16 Eighth Amendment prohibits prison guards from using excessive force that is applied to  
17 "maliciously and sadistically cause harm" to inmates. *Hudson v. McMillian*, 503 U.S. 1, 6-7  
18 (1992). In contrast, claims of excessive force during an arrest are analyzed under the Fourth  
19 Amendment. *Graham v. Connor*, 490 U.S. 386, 395 (1989). The Eighth Amendment also  
20 prohibits prison guards from denying, delaying, or interfering with a prisoner's access to medical  
21 attention "if the denial amounts to deliberate indifference to serious medical needs of the  
22 prisoners." *Toussaint v. McCarthy*, 801 F.2d 1080, 1111 (9th Cir. 1986), abrogated in part on  
23 other grounds by *Sandin v. Connor*, 515 U.S. 472 (1995). However, deliberate indifference  
24 claims brought by pre-trial detainees arise under the Fourteenth Amendment's Due Process  
25 Clause, rather than the Eighth Amendment. See *Castro v. County of Los Angeles*, 833 F.3d 1060,  
26 1069-70 (2016). Because both of plaintiff's Eighth Amendment claims concern actions taken  
27 against him as a pre-trial detainee rather than as a prisoner, the court instead considers plaintiff's  
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1 excessive force claim under the Fourth Amendment, see *Graham*, 590 U.S. at 395, and the court  
2 considers plaintiff’s deliberate indifference claim under the Fourteenth Amendment.

3 **c. Fourteenth Amendment Claims**

4 Plaintiff claims that his Fourteenth Amendment rights were violated in Counts I, II, and  
5 III, but does not specify the relevant clauses under which he intends to bring his claims. Without  
6 the benefit of further guidance, the court construes plaintiff’s Count I Fourteenth Amendment  
7 claim as a Fourth Amendment excessive force claim. *Colorado v. Bannister*, 449 U.S. 1, 2  
8 (1980) (the Fourth Amendment is applicable against state and local government actors through  
9 the Fourteenth Amendment’s Due Process Clause.) Additionally, the court construes plaintiff’s  
10 Count II deliberate indifference claim as a Fourteenth Amendment Due Process claim. See *Castro*  
11 *v. County of Los Angeles*, 833 F.3d 1060, 1069-70 (2016). Finally, the court reviews plaintiff’s  
12 Count III claims. Each claim is considered in turn.

13 **i. Count I Fourth Amendment Claim**

14 The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons,  
15 houses, papers, and effects, against unreasonable searches and seizures ....” U.S. CONST. amend.  
16 IV. “The Fourth Amendment requires police officers making an arrest to only use an amount of  
17 force that is objectively reasonable in light of the circumstances facing them.” *Blankenhorn v.*  
18 *City of Orange*, 485 F.3d 463, 477 (9th Cir. 2007). “Not every push or shove, even if it may later  
19 seem unnecessary in the peace of a judge’s chambers, violates the Fourth Amendment.” *Graham*,  
20 490 U.S. at 396 (internal citation and quotation omitted). “Force is excessive when it is greater  
21 than is reasonable under the circumstances.” *Santos v. Gates*, 287 F.3d 846, 854 (9th Cir. 2002).

22 Courts determine whether an amount of force was reasonable “by balancing the ‘nature  
23 and quality of the intrusion’ on an individual’s liberty against the ‘countervailing governmental  
24 interests at stake.’” *Id.* at 859 (quoting *Graham*, 490 U.S. at 396). This involves an examination  
25 of the “facts and circumstances of each particular case, including the severity of the crime at  
26 issue, whether the suspect poses an immediate threat to the safety of the officers or others, and  
27 whether he is actively resisting arrest or attempting to evade arrest by flight.” *Graham*, 490 U.S.  
28 at 396. Reasonableness is judged from the perspective of a reasonable officer at the scene of the

1 arrest, “rather than with the 20/20 vision of hindsight.” *Id.* The standard for excessive force  
2 applied under the Fourth Amendment differs greatly from the standard applied in Eighth  
3 Amendment excessive force claims because “pretrial detainees (unlike convicted prisoners)  
4 cannot be punished at all, much less maliciously and sadistically.” *Kingsley v. Hendrickson*, 135  
5 S.Ct. 2466, 2475 (2015).

6 Taking plaintiff’s allegations as true, he states a claim for excessive force. Plaintiff  
7 alleges that Fye, Butler, and Krall repeatedly struck and tased plaintiff, even after he was subdued  
8 and placed in handcuffs. (ECF No. 4.) Without any indication that plaintiff was resisting arrest,  
9 the severity of the officer’s application of force outweighs the government’s interest in detaining  
10 plaintiff. No reasonable officer, under the circumstances as alleged, would conclude that Fye,  
11 Butler, and Krall’s repeated tasing and slamming of plaintiff’s head was reasonable.  
12 Accordingly, the court recommends that plaintiff’s excessive force claim proceed against Fye,  
13 Butler, and Krall.

14 **ii. Count II Fourteenth Amendment Due Process Claim**

15 Plaintiff asserts that Fye, Butler, and Krall violated his Fourteenth Amendment rights by  
16 refusing to provide plaintiff with medical attention for the injuries he sustained during his arrest.  
17 (ECF No. 1-1 at 5.) Deliberate indifference claims brought by pre-trial detainees are analyzed  
18 under the Fourteenth Amendment’s Due Process Clause. See *Castro v. County of Los Angeles*,  
19 833 F.3d 1060, 1069-70 (2016). In following Eighth Amendment jurisprudence, a pre-trial  
20 detainee claiming deliberate indifference can avoid dismissal by alleging that he was (1)  
21 “confined under conditions posing a risk of ‘objectively, sufficiently serious’ harm” and (2) “that  
22 the officials had a ‘sufficiently culpable state of mind’ in denying the proper medical care.” *Lolli*  
23 *v. Cty. of Orange*, 351 F.3d 410, 419 (9th Cir. 2003) (citing *Clement v. Gomez*, 298 F.3d 898, 904  
24 (9th Cir.2002)). As for the second prong, a “defendant is liable for denying needed medical care  
25 only if he ‘knows of and disregards an excessive risk to inmate health and safety.’” *Id.* (quoting  
26 *Gibson v. County of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002)). However, a recent Ninth  
27 Circuit opinion has cast the standard that pre-trial detainees must meet into doubt. See *Castro*,  
28 833 F.3d at 1069-70. In *Castro*, the Ninth Circuit “rejected the notion that there exists a single



1 “deliberate indifference” standard applicable to all § 1983 claims, whether brought by pretrial  
2 detainees or by convicted prisoners.” Id. at 1069 (relying on *Kingsley v. Hendrickson*, 135 S.Ct.  
3 2466 (2015)). Instead, the court held that only the more forgiving objective standard applies to a  
4 pre-trial detainee’s excessive force claims and failure-to-protect claims because, in part, pre-trial  
5 detainees are entitled to greater protections under the Fourteenth Amendment’s Due Process  
6 Clause than a prisoner is entitled to under the Eighth Amendment’s Cruel and Unusual  
7 Punishment Clause. *Castro*, 833 F.3d at 1069-70; Cf. *Stone v. City of San Francisco*, 968 F.2d  
8 850, 857 n.10 (9th Cir. 1992 (“[P]retrial detainees . . . possess greater constitutional rights than  
9 prisoners.”)).

10 The court need not decide which standard applies because plaintiff’s allegations satisfy  
11 both the objective and subjective elements of a deliberate indifference claim. Plaintiff claims that  
12 he was arrested and denied medical attention after suffering “multiple contusions, lacerations, and  
13 abrasions,” loss of consciousness, and possibly a concussion. (ECF No. 1-1 at 5.) Taking these  
14 allegations as true, plaintiff’s confinement with such severe injuries constitutes “conditions  
15 posing a risk of ‘objectively, sufficiently serious’ harm.” *Lolli*, 351 F.3d at 419. Furthermore,  
16 plaintiff alleges that Fye, Butler, and Krall purposefully refused to provide plaintiff with medical  
17 attention in order to avoid creating evidence “that could be used against them.” (ECF No. 1-1 at  
18 5.) He further states that after requesting medical attention, one officer responded by saying,  
19 “Shut the fuck up nigger!” (Id.) As stated, the officer’s displayed a ‘sufficiently culpable state of  
20 mind’ because their denial of medical care appears to be purposeful, self-interested, and perhaps  
21 racially motivated. *Lolli*, 351 F.3d at 419. Accordingly, plaintiff states a cognizable claim that  
22 Fye, Butler, and Krall were deliberately indifferent to plaintiff’s medical needs. The court  
23 recommends that plaintiff’s Count II Fourteenth Amendment claim against Fye, Butler, and Krall  
24 proceed.

25 **iii. Count III Fourteenth Amendment Claim**

26 Finally, plaintiff contends that both he and his son suffer from “serious mental health  
27 issues” as a result of the arrest. He claims that this is a violation of the Fourteenth Amendment,  
28 but fails to specify the relevant legal theory under which he intends to bring his claim. While the

1 court was able to construe plaintiff's Count I allegations as an excessive force claim, plaintiff  
2 provides insufficient factual detail here for the court to analyze. See McHenry, 84 F.3d 1179.  
3 Plaintiff's allegations that he suffers from "nightmares" seems only to be an outgrowth of his  
4 excessive force claim. Without more, plaintiff's factual allegations simply do not state a  
5 plausible claim under the Due Process Clause. 28 U.S.C. § 1915(e)(2)(B)(ii). Accordingly, the  
6 court recommends that plaintiff's Count III Fourteenth Amendment Due Process Claim be  
7 dismissed without prejudice, with leave to amend because it is not clear that amendment would be  
8 futile. See Cato, 70 F.3d at 1106.

9 **iv. Plaintiff's Count III Claim Brought on His Son's Behalf**

10 To the extent plaintiff is bringing a claim on behalf of his minor child, the claim is barred  
11 Federal Rule of Civil Procedure 17. Rule 17 authorizes only certain categories of representatives  
12 to sue on behalf of a minor – a general guardian, a committee, a conservator, or "a like fiduciary,"  
13 such as a court appointed guardian ad litem. FED. R. CIV. P. 17(C)(1)-(2). Even so, Rule 17 by its  
14 own terms does not authorize a listed representative to proceed pro se on behalf of a minor. See  
15 Johns v. County of San Diego, 114 F.3d 874, 876 (9th Cir. 1997). In applying the policy  
16 undergirding Rule 17, the Ninth Circuit held that "a parent or guardian cannot bring an action on  
17 behalf of a minor child without retaining a lawyer." Id. at 877 ("It goes without saying that it is  
18 not in the best interest of minors . . . that they be represented by non-attorneys."). Minors, such as  
19 plaintiff's son, are "entitled to trained legal assistance so their rights may be fully protected." Id.  
20 at 876-77.

21 Though the court may presume that plaintiff is his son's guardian, this alone does not  
22 automatically entitle plaintiff to bring a claim on his son's behalf pro se. Plaintiff's own failure  
23 to properly state many of his claims shows that allowing plaintiff to sue on behalf of his son  
24 would not be in his son's best interests. Thus, if plaintiff wishes to bring an action on behalf of  
25 his son, plaintiff must show that he has secured a lawyer to proceed. Id.; see also Buran v. Riggs,  
26 5 F. Supp. 3d 1212, 1215-16 (D. Nev. 2014). Accordingly, the court recommends that plaintiff's  
27 claim brought on his son's behalf be dismissed without prejudice, with leave to amend to provide  
28 plaintiff with an opportunity to retain a lawyer, if possible.

1 **IV. CONCLUSION**

2 For the foregoing reasons, plaintiff states colorable § 1983 claims under the Fourteenth  
3 Amendment against Fye, Butler, and Krall for excessive force and deliberate indifference to  
4 plaintiff’s medical needs. However, plaintiff fails to state a cognizable claim against the City of  
5 Sparks, Washoe County, and SPD because he does not identify a legal theory, or allege any facts,  
6 for the court to analyze. Similarly, plaintiff fails to state a cognizable claim under the Fourteenth  
7 Amendment for his mental health issues. Moreover, plaintiff cannot bring a claim on behalf of  
8 his minor child without retaining a lawyer. Finally, the State of Nevada is immune from suit, and  
9 plaintiff’s Sixth and Eighth Amendment claims fail because plaintiff was not a convicted prisoner  
10 at the time of the alleged violations. The court recommends that plaintiff be granted leave to  
11 amend to cure the deficiencies described above, where possible.

12 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of  
13 Practice, the parties may file specific written objections to this Report and Recommendation  
14 within fourteen days of receipt. These objections should be entitled “Objections to Magistrate  
15 Judge’s Report and Recommendation” and should be accompanied by points and authorities for  
16 consideration by the District Court.

17 2. This Report and Recommendation is not an appealable order and any notice of  
18 appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court’s  
19 judgment.

20 **V. RECOMMENDATION**

21 **IT IS THEREFORE RECOMMENDED** that plaintiff’s application to proceed in  
22 forma pauperis (ECF No. 1) be **GRANTED**;

23 **IT IS FURTHER RECOMMENDED** that the Clerk **FILE** plaintiff’s complaint (ECF  
24 No. 1-1);

25 **IT IS FURTHER RECOMMENDED** that plaintiff’s Count I Fourteenth Amendment  
26 excessive force claim **PROCEED** against Fye, Butler, and Krall.

27 **IT IS FURTHER RECOMMENDED** that plaintiff’s Count II Fourteenth Amendment  
28 deliberate indifference claim **PROCEED** against Fye, Butler, and Krall.

1           **IT IS FURTHER RECOMMENDED** that all claims set forth against the City of Sparks,  
2 Washoe County, and SPD, and Fourteenth Amendment claims regarding the mental health issues  
3 of plaintiff and his son contained in Count III, be **DISMISSED WITHOUT PREJUDICE,**  
4 **WITH LEAVE TO AMEND.**

5           **IT IS FURTHER RECOMMENDED** that all claims set forth against the State of  
6 Nevada, and the Sixth and Eighth Amendment claims against all defendants contained in Counts  
7 I, II, III, be **DISMISSED WITH PREJUDICE.**

8           **IT IS FURTHER ORDERED** that plaintiff shall have **thirty (30) days** from the date that  
9 this order is entered to file an amended complaint remedying, if possible, the defects identified  
10 above. The amended complaint must be a complete document in and of itself, and will supersede  
11 the original complaint in its entirety. Any allegations, parties, or requests for relief from prior  
12 papers that are not carried forward in the amended complaint will no longer be before the court.  
13 Plaintiff is advised that if the amended complaint is not filed within the specified time period, the  
14 court will recommend dismissal of his complaint **WITH PREJUDICE.** Plaintiff shall clearly title  
15 the amended complaint by placing the words “FIRST AMENDED” immediately above “Civil  
16 Rights Complaint Pursuant to 42 U.S.C. § 1983” on page 1 in the caption, and plaintiff shall place  
17 the case number, 3:17-cv-00321-MMD-VPC, above the words “FIRST AMENDED  
18 COMPLAINT.”

19 **DATED:** October 25, 2017.

20   
21 **UNITED STATES MAGISTRATE JUDGE**